No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, By And Through Her Father And Next Friend, EMORY CARTER,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF THE STATES OF ARIZONA, GEORGIA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

*Counsel of Record

[Additional Counsel listed on inside cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85507

MICHAEL J. BOWERS
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

RICHARD IEYOUB
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005

MICHAEL E. CARPENTER
Attorney General of Maine
State House Station #6
Augusta, Maine 04333

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

ROBERT J. DEL TUFO
Attorney General of New Jersey
Justice Complex
CN080
Trenton, New Jersey 08625

TOM UDALL
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

MICHAEL F. EASLEY
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

HEIDI HEITKAMP
Attorney General of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota 58506

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

T. TRAVIS MEDLOCK
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

MARK BARNETT
Attorney General of South Dakota
State Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

CHARLES BURSON
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

STEPHEN D. ROSENTHAL
Attorney General of Virginia
101 North Eighth Street
Richmond, Virginia 23219

JOSEPH B. MEYER
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to State reimbursement under the Individuals with Disabilities Education Act ("IDEA") when they unilaterally place her in a private school that does not meet State educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the State is required to provide under 20 U.S.C. §§ 1401(a)(18) and 1412(1) as a condition of receiving federal funding under the Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT 2

ARGUMENT 7

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA 7

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA 22

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981) 15

Board of Education v. Rowley, 458 U.S. 176 (1982) 13,14,18,22

Conklin v. Anne Arundel County Board of Education, 946 F.2d 306 (4th Cir. 1987) 21

Honig v. Doe, 484 U.S. 305 (1988) 15,18

Schimmel ex rel. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) 21

School Committee of the Town Burlington v. Department of Education, 471 U.S. 359 (1985) 9,11

Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989) 21

Statutes, Regulations and Rules

20 U.S.C. § 1400(c) 8,11,23
20 U.S.C. § 1401(a)(18) i,8
20 U.S.C. § 1401(a)(18)(B) 11
20 U.S.C. § 1411(a)(1)(B)(v) 28
20 U.S.C. § 1412(1) i,3,11
20 U.S.C. § 1412(5)(G) 18
20 U.S.C. § 1413 13
20 U.S.C. § 1413(a)(2) 11
20 U.S.C. § 1413(a)(4)(B) 3
20 U.S.C. § 1413(a)(4)(B)(ii) 12
20 U.S.C. § 1415 20
20 U.S.C. § 1415(e)(2) 14

Md. Educ. Code Ann. § 8-403(c) 17
Md. Educ. Code Ann. § 8-409(a) 17

North Carolina Procedures Governing
Programs and Services for Children
with Special Needs § 1527 17

34 C.F.R. § 300.153(a)(1)(ii) 16
34 C.F.R. § 300.153(b)(2) 16

Code of Maryland Regulations
§ 13A.05.01.11 17
§ 13A.05.01.11(d) 17
§ 13A.09.09 17

Sup. Ct. R. 37 2

Miscellaneous

S. Rep. No. 94-168, P.L. 94-142,
94th Cong., 1st Sess., reprinted in
1975 U.S. Cong. & Admin. News 27

S. Conf. Rep. No. 94-455, P.L.
94-142, 94th Cong., 1st Sess.,
reprinted in 1975 U.S. Code Cong.
& Admin. News 28

14th Annual Report to Congress
on the Implementation of the
Individuals with Disabilities Act:
To Assure the Free Appropriate
Public Education of All Children
with Disabilities (United States
Department of Education, 1992) 25-26,29

No. 91-1523

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ARIZONA, GEORGIA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as amici curiae in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case involves the States' ability to regulate the provision of publicly funded special education services in private schools. The Fourth Circuit's decision severely restricts that ability and impairs the States' capacity to meet their obligations under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., and has serious adverse consequences for both the quality and cost of special education services. Those consequences will be especially burdensome in today's harsh economic environment in which special education costs have exploded at the same time that the

federal government's share of these costs has steadily shrunk.

Each State that receives federal funding under the IDEA is responsible for assuring "all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). This obligation extends to students educated in private as well as public schools, and in most States takes the form of both significant regulatory responsibility and substantial financial obligation. See id. § 1413(a)(4)(B).

The issue in this case is whether State or local education agencies must reimburse parents who unilaterally place children with disabilities in private schools that do not meet the States' special education standards. The Fourth Circuit held that when a local school system has not provided an appropriate education

to a student with disabilities, the student's parents may place that student in a private school and obtain reimbursement from the State, even though the private school failed to meet fundamental educational requirements imposed by the IDEA. This Court should reverse the decision below and hold that the IDEA does not require public reimbursement to schools that do not satisfy the IDEA's most rudimentary standards.

In finding that the private placement in this case was reimbursable, the Fourth Circuit disregarded the IDEA's central purpose in seeking to provide a "free appropriate public education" to all children covered by that Act, and simultaneously exposed public agencies to financial liability for costly unilateral private school placements that fall far short of the IDEA's standards. The IDEA imposes upon the States the weighty obligation to ensure

that all students with disabilities receive an appropriate education, and sets elaborate standards for appropriateness. The decision below makes it substantially more difficult for States, local school systems and private schools approved by the States to fulfill those standards, while removing many private institutions -- and students -- from the IDEA's reach.

The Fourth Circuit dismissed these concerns with the assurance that similar cases would be so rare as to have trivial systemic impact on the education of students with disabilities. In the year that has passed since the Fourth Circuit decided this case, however, the experiences of States in the Fourth Circuit suggest that the decision below has had and will continue to have a substantial adverse affect on special education services. Increasing numbers of cases have been filed within those States by

parents seeking reimbursement for private placements in schools that do not meet State special education standards and requirements. These private placements, which may cost between $50,000 - $100,000 per student annually, represent the most expensive component of a State's special education budget and needlessly drain substantial financial resources from necessary and appropriate special education programs.

Reimbursing inappropriate private placements with public funds also removes the incentive for private schools to cooperate with the States' efforts to ensure IDEA compliance and meet important but costly special education standards. Reversal is warranted, therefore, to halt the serious erosion that the decision below has caused in the States' ability to enforce adherence with IDEA standards as a condition of reimbursement.

Unless this Court reverses that decision, State education agencies will be severely hampered in their efforts to serve students with disabilities in accordance with the IDEA's mandates.

ARGUMENT

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA.

In holding that private schools accepting unilateral placements need not meet "the whole panoply of duties" imposed by the IDEA (App. at 16a), the Fourth Circuit has fashioned a rule that allows these schools to evade the IDEA's critical educational requirements and still

obtain public reimbursement. That decision is wrong because Congress never intended the IDEA to compel public agencies to pay for educational programs that fail to comply with the IDEA's essential statutory duties.

The plain language of the IDEA requires State education agencies ("SEAs") to scrutinize carefully non-public programs that serve students with disabilities and to ensure that such programs meet the same standards as public school special education programs. The IDEA mandates that all children with disabilities "have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). 20 U.S.C. § 1401(a)(18) defines "free appropriate public education" as special education and related services that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,

> (B) meet the standards of the State educational agency, . . . [and]
>
> (D) are provided in conformity with the individualized education program. . . .

(Emphasis added).

The IDEA fulfills its central purpose of providing disabled children with "both an appropriate education and a free one," School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 372 (1985), by unambiguously mandating that the SEAs bear standard-setting and monitoring responsibility over all special education programs. Conversely, the IDEA does not exempt private, unilateral placements from the obligation to provide free appropriate public education, or the SEAs from ensuring that private schools meet that obligation. Many SEAs thus operate private school

accreditation systems to regulate non-public school placements for conformance with the IDEA.

Notwithstanding the substantial requirements that the IDEA imposes to ensure an appropriate education, the Fourth Circuit expressly acknowledged that the private school in this case did "not attempt to comply with the terms of the Act." (App. at 11a.) Indeed, any compliance attempt would have been unsuccessful, as the court noted that (1) the school did not develop Individualized Education Plans ("IEPs") for special education students, and (2) the school employed teachers -- one of whom taught respondent Shannon Carter -- who failed to meet federal standards for special education personnel, and (3) these teachers "were not certified by the state" and so "[u]nder state law . . . are prohibited from teaching in a South Carolina public

school." (App. at 11a-12a) (emphasis added). State reimbursement is simply inappropriate in light of these profound deficiencies in this private school placement.

This Court has stated that a federal court has the power under the IDEA "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Burlington, 471 U.S. at 369 (emphases added). A placement is proper under the IDEA if -- and only if -- it provides the equivalent of a free appropriate public education, see, e.g., 20 U.S.C. §§ 1400(c); 1412(l); 1413(a)(2), which the IDEA expressly defines is an education provided by a program that "meet[s] the standards of the State educational agency . . . ." Id. § 1401(a)(18)(B).

The Fourth Circuit's analysis passed over these fundamental principles by ignoring the statutory definition of free appropriate public education, and instead focusing solely on an IDEA provision that directs the States to ensure that private schools to which public agencies refer students "meet standards that apply to State and local educational agencies . . . ." Id. § 1413(a)(4)(B)(ii). The court reasoned that this provision applies only to private placements made by public agencies and not to unilateral placements by parents, and that the student's private school program did not have to meet State standards because "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." (App. at 13a.)

Neither the IDEA, including the narrow provision

above that the Fourth Circuit cited, nor any of this Court's decisions support the Fourth Circuit's holding that unilateral private school placements are entitled to State reimbursement merely by providing an education "reasonably calculated to enable the child to receive educational benefits." (App. at 17a), quoting Board of Education v. Rowley, 458 U.S. 176, 207 (1982).[1] To the contrary, this Court has stated that a reviewing court must make a more complete inquiry in determining whether reimbursement is appropriate under the IDEA:

---

[1] 20 U.S.C. § 1413, which is entitled "State plans," sets forth the elements that must be contained in each State plan for special education. That provision provides that the State plan must include policies and procedures that assure that when public agencies place students in private schools to carry out the requirements of the IDEA, those schools must meet standards of appropriateness. That section does not require, however, that State plans make any provisions for reimbursement of the costs of unilateral private school placements that parents make outside of the process that the IDEA prescribes.

> [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. at 206-07 (footnotes omitted).

This Court in Rowley recognized "the importance Congress attached to [the IDEA's] procedural safeguards," and observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation . . . as it did upon the measurement of the resulting IEP against a substantive standard." 458 U.S. at 205-06. IEPs serve as "the vehicle for giving content to the required 'free appropriate public education,'"

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 272-73 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981), and constitute "the centerpiece of the statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988). Unless an educational program is based upon an IEP, therefore, it is not "appropriate" under the IDEA, and a State cannot use its special education resources to pay for services provided by such a program.

The IDEA similarly does not sanction State reimbursement for services provided by uncertified teachers. The IDEA makes the States responsible for the staff qualifications in private schools, as federal regulations explicitly command that the States set suitable qualifications for personnel providing the IDEA's services to students "served by State, local and

private agencies." 34 C.F.R. § 300.153(a)(1)(ii) (emphasis added). These requirements, at the entry level, must be

> consistent with any State approved or recognized certification, licensing, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

Id. § 300.153(b)(2).

To ensure that these and other key IDEA requirements are met by all programs serving students with disabilities, the States have implemented private school approval programs that oversee compliance by public and private agencies with the IDEA's core mandate of individualized education and its clear regulatory personnel standards.[2] In addition, the SEAs

[2] For example, Maryland law expressly provides that "a (continued...)

carefully scrutinize programs to determine that they meet the IDEA's other important standards, such as education in the least restrictive environment, see 20

[2](...continued)
child who needs special education services that are not provided in a public county, regional, or State program shall be placed in an appropriate nonpublic educational program that offers these services." Md. Educ. Code Ann. § 8-409(a). That law directs the State Board of Education to develop regulatory standards for accreditation of non-public programs, and mandates that the standards for non-public entities serving students with disabilities "may not be lower than the standards for the education of children who are enrolled in programs that are operated by a county board." Md. Educ. Code Ann. § 8-403(c).

Accordingly, the Maryland State Board of Education has promulgated regulations to govern the accreditation of non-public special educational programs so that they meet the IDEA's requirements. To gain such approval, the program must meet explicit standards which set forth the minimal criteria for special education services embodied in the IDEA and demanded of public school systems in this State. See Code of Maryland Regulations §§ 13A.09.09; 13A.05.01.11. In addition, the non-public institution must have written policies and procedures ensuring that IEPs are developed for each student with disabilities. Id. § 13A.05.01.11(d). Similar regulatory programs exist in other States. See, e.g., North Carolina Procedures Governing Programs and Services for Children with Special Needs § 1527.

U.S.C. § 1412(5)(G); Rowley, 458 U.S. at 202-03, parental involvement, including access to due process proceedings; see 20 U.S.C. § 1415; Rowley, 458 U.S. at 205-06; and appropriate student discipline policies. See Honig v. Doe, 484 U.S. 305 (1988).

It is thus contrary to the IDEA's strict regulatory scheme to require State reimbursement in this case where the private school developed no IEP and otherwise failed to meet federal special education personnel standards and South Carolina's teacher certification requirements. The Fourth Circuit perceived some implicit unfairness in imposing these federal and State educational requirements on schools selected by parents who believe their child's public education to be inappropriate and who, "on their own, seek alternative schooling." (App. at 15a.) But parents have many

options and full access to the information needed to place their child in an appropriate school. Indeed, the Fourth Circuit cited South Carolina statutes and regulations governing the placement of children in approved private schools that meet State standards (App. at 13a-14a), implicitly acknowledging, therefore, that the Carters could have obtained assistance from State and local educational agencies in selecting an appropriate private school for their daughter.

Moreover, accreditation and systemic monitoring of private schools exist in many States and operate to provide parents dissatisfied with their child's public placement with a range of private schools from which to choose.[3] In States with small school-age populations,

---

[3] In Maryland, for example, there are more than fifty private schools accredited to provide a full range of special (continued...)

it may also be feasible for an SEA to examine each proposed private school placement individually to determine whether the school meets the IDEA's standards. Similarly, an SEA may elect to delegate a portion of ongoing school monitoring to local school systems where requests for placement arise.

Therefore, notwithstanding the Fourth Circuit's concern for the choice faced by parents who believe that their child's public education is inappropriate, it is not unreasonable to expect parents who demand that the public pay for a costly private school placement to inquire into whether that placement is appropriate. Such an inquiry into whether a private school meets minimum

---

[3](...continued)
education services, and the SEA publishes a list of those programs. That list is publicly available from both the SEA and each local school system in the State.

State standards would seem an essential component in any parental effort to identify a special education program for a child with disabilities.[4]

Here, as the Fourth Circuit found, "approval of Shannon's placement at Trident had never been sought from the State Department of Education." (App. at 5a.) In light of that, and that the school's special education services fell far short of the IDEA's and South Carolina's standards, and that the parents in this case

---

[4] Ironically, prior to its decision in this case, the Fourth Circuit repeatedly held that State approval was a condition precedent to public reimbursement for unilateral private school placements. See Conklin v. Anne Arundel County Board of Education, 946 F.2d 306, 311 n.5 (4th Cir. 1991) ("A state properly has a legal right to impose certain requirements and conditions on a special education facility before the state can be forced to pay for the education of a handicapped child there."); Schimmel ex rel. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) (holding that the State of Virginia was not financially responsible for the parents' placement of their child in an unapproved out-of-state facility). Accord Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989).

presented no proof that they expended any effort toward placing her in a private school that met State requirements, the public should not be required to bear the costs of that placement.

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA.

The decision below underscores this Court's admonition that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207. The court's decision in this case means that a school system which, at worst, may have merely underestimated a student's academic goals in the context of an effective IEP must now pay for placement in a private school that

does not meet the IDEA's requirements for individualized education.[5] That finding significantly broadens the States' duty by creating liability for placements in private programs that do not meet the IDEA's most basic standards, and seriously impedes the States' ability to ensure the provision to all children of an appropriate education under the IDEA.

20 U.S.C. § 1400(c) identifies four goals that the IDEA strives to achieve: (1) "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special

---

[5] This Court granted certiorari only on the first question presented in Florence County's petition and thus is not reviewing the propriety of the Fourth Circuit's decision that the public placement in this case did not provide a free appropriate public education under the IDEA. That decision is incorrect, however, for the reasons stated in Florence County's petition and the States' amici brief supporting that petition.

education and related services designed to meet their unique needs;" (2) "to assure that the rights of children with disabilities and their parents or guardians are protected;" (3) "to assist States and localities to provide for the education of all children with disabilities;" and (4) "to assess and assure the effectiveness of efforts to educate children with disabilities." To fulfill that broad mission, Congress imposed virtually all of the IDEA's obligations on State and local education agencies, with the expectation that the federal government would provide substantial financial assistance.

But in the nearly two decades since the IDEA's passage, the burdens on the State and local education agencies have increased at a dramatic rate while the federal financial contribution has diminished steadily. The Fourth Circuit's decision in this case creates a

severe hardship for State and local agencies already struggling to meet the IDEA's growing mandate. By expanding upon one of the IDEA's goals -- parental procedural safeguards -- the Fourth Circuit has impaired, in both financial and programmatic ways, the public agencies' ability to meet the IDEA's primary purpose of assuring a free appropriate public education to all students with disabilities.

Since the IDEA was enacted, the number of students receiving special education services has increased by more than a third. In 1976-77, 3,485,088 students were served under the IDEA. That number has increased on average by more than 2% per year and in 1990-91 had grown to 4,817,503. See 14th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act: To Assure the Free

Appropriate Public Education of All Children with Disabilities (United States Department of Education, 1992) ("14th Annual Report to Congress"), at 3. The percentage of special education students as a percentage of the total school population has increased similarly from 4.8% in 1976-77 to 7.1% in 1990-91. Id.[6]

While the number of students with disabilities has climbed steadily, special education costs have escalated at an even more explosive rate. In Fiscal Year 1991, for example, Maryland spent $571,925,633 to educate students with disabilities, which was over $80,000,000

[6] The growth in the numbers of students with disabilities has numerous causes: the addition of new categories of disabilities and covered services in amendments to the 1975 act; program enhancements by education agencies; increases in the number of children with learning and behavioral disabilities arising from pre-natal exposure to alcohol and drugs; and, recently, increasing referrals of disruptive or other "difficult to teach" students to the special education system. Id. at 3-5.

more than the Fiscal Year 1989 total of $489,932,292 and more than double the cost of $211,833,657 in Fiscal Year 1981. See Financial Reports of the Program and Finance Unit, Maryland State Department of Education ("MSDE Financial Reports").

Further, as special education costs have mounted dramatically, the federal share of those costs has dropped, contrary to Congress' original intentions. In developing the federal funding formula in 1975, the Senate anticipated that, initially, the federal share should comprise 25% of the costs of providing special education services that exceeded the average amount spent for non-disabled students, see S. Rep. No. 94-168, P.L. 94-142, 94th Cong., Ist Sess., reprinted in 1975 U.S. Cong. & Admin. News, p. 1439, while Congress anticipated that by 1982, the federal share of the

education of each student with disabilities could increase to 40% of the average national per-pupil cost for all public students. See 20 U.S.C. § 1411(a)(1)(B)(v); see also S. Conf. Rep. No. 94-455, P.L. 94-142, 94th Cong., lst Sess., reprinted in 1975 U.S. Code Cong. & Admin. News, p. 1487.[7]

In practice, however, federal assistance for special education has not approached those proportions, and instead in recent years has declined constantly as a percentage of total special education expenditures. Federal assistance accounted for only 7.9% of special education costs nationally in 1987-88, for example, see

[7] The Senate report calculated that it would cost approximately twice as much to educate a student with disabilities as it would to teach non-disabled students. See S. Rep. No. 94-168, P.L. 94-142, 94th Cong., lst Sess., reprinted in 1975 U.S. Code Cong. & Admin. News, p. 1439. The percentage figures cited above are based on that assumption.

14th Annual Report to Congress, at xxiii, which is well below what Congress projected a decade earlier. Similarly, in Maryland in Fiscal Year 1991, the federal contribution had dropped to 5.9% of the total cost of special education, down from 10.4% in Fiscal Year 1981. See MSDE Financial Reports.[8]

Other States similarly have been plagued with spiraling special education costs and a decreasing federal contribution toward those costs. Local education agencies in North Carolina, for example, reported that $184 million were spent on special education and related services in the 1985-86 school year, and that $326

[8] The 5.9% figure represents the federal share of total expenditures in Maryland for the education of students with disabilities. If only the "excess cost" of educating those students is calculated (i.e., the average cost of providing special education to a student that exceeds the cost of educating a non-disabled student), the federal share is 7.9%.

million were spent on those same services in the 1990-91 school year. See Financial Reports of the North Carolina Department of Public Instruction, Division of Exceptional Children's Services. The federal government's share of those expenditures, however, rose from $34 million in the 1985-86 school year to only $42 million in the 1990-91 school year. Thus, the federal government's percentage share of these costs decreased from approximately 19% to 13% in that period.

Nowhere has the growing State and local special education burden been more onerous than in the area of private school placements, which constitute the most expensive element in the range of special education services. Indeed, in Fiscal Year 1992, Maryland's total expenditure for private school special education placements was $63,426,735 for 2,016 students, which

far exceeded the entire federal IDEA contribution to the State of $35,777,375. See MSDE Financial Reports. Moreover, of those Maryland expenditures, the total costs of residential private school placements alone more than tripled from $9,180,422 in 1985 -- the year this Court decided Burlington -- to $33,547,680 in 1992, while the average residential placement cost per pupil in that same period more than doubled from $25,015 in 1985 to $51,374 in 1992. See MSDE Financial Reports.

These rapidly increasing high average annual costs illustrate precisely why even a few private placements that are now reimbursable under the decision below can seriously obstruct the States' ability to meet their obligations to disabled and non-disabled students alike. For example, during the recessionary 1992 school year,

the average cost in Maryland of a private residential placement ($51,374) exceeded the approximate cost to educate more than eight students ($5,815 average expenditure per student), see Maryland School Performance Report 1992 (Maryland State Department of Education, 1992), p.11, as well as the estimated cost to purchase the equivalent services of 1.3 full-time teachers in the State ($39,054 average teacher's salary). See "Professional Salary Schedules: Maryland Public Schools 1992-93" (Maryland State Department of Education, 1993). Given these high per-placement costs and the sudden, unpredictable nature of a finding of liability, therefore, a single placement that is now reimbursable under the Fourth Circuit's decision can force real reductions in services for other students, especially in small school districts.

The Fourth Circuit's decision imposes other additional costs that adversely affect the ability of State and local education agencies to provide a free appropriate public education. Public agencies often are able to negotiate with private schools reasonable tuition charges and other fees when approving those schools. However, because of the decision below, private schools no longer have the same incentive to seek State approval, and no such cost controls apply to schools accepting unilateral placements that fail to seek that approval. Thus, the cost of education services in an unapproved program may be far more than the cost that public agencies pay for the same services in an approved school.

Fiscally strapped public education agencies face these impediments at the same time they confront the greatest

demand ever for special education resources. The Fourth Circuit nevertheless dismissed the seriousness of this problem with the observation that "parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education." (App. at 18a.) Unfortunately, this assessment appears to be inaccurate, as there are already early signs of the systemic harm that the decision below has caused with respect to the public agencies' ability to ensure free appropriate public education.[9]

---

[9] In Maryland, where approximately 20-30 State administrative hearings are held each year for all reasons pursuant to the IDEA's due process requirements imposed by 20 U.S.C. § 1415, 8 of the 26 cases heard in 1992 invoked the decision below to demand reimbursement for unilateral private school placements. The parents prevailed in four of (continued...)

Most fundamentally, the Fourth Circuit's decision threatens the States' ability to ensure that private placements, even at currently approved schools, will continue to meet the IDEA's requirements. In eliminating any State capacity to ensure a free appropriate public education at schools that accept unilateral placements, the Fourth Circuit has substantially diluted the financial incentive that motivates private schools to comply with the IDEA's exacting standards and seek State approval. Because private schools can now obtain public reimbursement for some special education placements regardless of their IDEA compliance, fewer schools will undertake difficult and

---

[9](...continued)
those administrative decisions under the Carter standard, while the parents in the remaining four cases have appealed to federal district court.

costly efforts to meet State and federal special education standards. Public agencies will thus find themselves with a smaller range of private school programs in which to place students who truly need intensive non-public services, and will be less able to regulate private school providers as a whole for IDEA compliance.[10]

State and local education agencies already bear a heavy and growing financial burden in their efforts to meet IDEA requirements, as they confront more students than ever before in need of special education services, soaring costs, and a federal contribution that is

---

[10] It is ironic that at the same time that it diminished the financial incentive that private schools have to comply with the IDEA's standards, the Fourth Circuit emphasized the principle that public agencies can place students only in programs that meet those standards. See App. at 13a (stating that "private schools receiving funds under the Act [must] meet state educational standards . . . only when the child is placed in the private school by the state or local school system.").

far less than Congress contemplated and that shrinks each year as a portion of total special education costs. The Fourth Circuit's decision exacerbates this increasingly critical situation in public education by imposing new fiscal obligations and weakening the States' ability to ensure that non-public facilities meet State and federal standards for students with disabilities.

That result directly contravenes Congress' manifest intent that the States vigorously assure that all students with disabilities receive a free appropriate public education, and that federal special education funds should be spent for that purpose alone. This Court should reverse the decision below, therefore, and hold that Congress did not intend increasingly scarce special education resources to be used to pay for costly services that do not meet the IDEA's well-established standards.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place
20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

*Counsel of Record